No. 90-169

In The

Supreme Court of the United States

October Term, 1990

ROSETTA N. DAVIS, ALMA C. OLIVER, and HAZEL PERRY,

Petitioners,

v.

STATE OF TENNESSEE, DEPARTMENT OF EMPLOYMENT SECURITY, ROBERT J. BIBLE, COMMISSIONER OF THE TENNESSEE DEPARTMENT OF EMPLOYMENT SECURITY, TENNESSEE DEPARTMENT OF PERSONNEL, WILLIAM C. KOCH, JR., COMMISSIONER OF PERSONNEL OF THE STATE OF TENNESSEE,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Do the terms "Minority Employees of the Tennessee Department of Employment Security, Inc., et al.," and "plaintiffs in the above action" fail to satisfy the specificity requirement of Rule 3(c) of the Federal Rules of Appellate Procedure as to the petitioners, Rosetta N. Davis, Alma C. Oliver, and Hazel Perry, resulting in no federal appellate jurisdiction over their claims?

2. Does Federal Rule of Appellate Procedure 26(b) prohibit the petitioners from amending their notice of appeal pursuant to 28 U.S.C. § 1653, where the petitioners attempted to make such an amendment more than thirty days after the final order of the district court?

PARTIES TO THE PROCEEDINGS BELOW

The petitioners in this action are Rosetta N. Davis, Alma C. Oliver, and Hazel Perry. Minority Employees of the Tennessee Department of Employment Security, Inc., was a party to the proceeding before the United States Court of Appeals for the Sixth Circuit; however, it is not a party to this petition for writ of certiorari. The respondents in this action are the Tennessee Department of Employment Security, Robert J. Bible, Commissioner of the Tennessee Department of Employment Security, the Tennessee Department of Personnel, and William C. Koch, Jr., Commissioner of the Tennessee Department of Personnel.

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The respondents respectfully request that this Court deny the petition for writ of certiorari seeking review of the Sixth Circuit decision, *en banc*, dated April 26, 1990. That decision is reported at 901 F.2d 1327 (6th Cir. 1990).

JURISDICTION

The petitioners assert that this Court has jurisdiction to consider their petition for writ of certiorari pursuant to 28 U.S.C. § 1291. That particular statutory provision vests jurisdiction with courts of appeal to hear final decisions from district courts, not jurisdiction for this Court to consider a petition for writ of certiorari from a court of appeal. Jurisdiction for this Court to consider a petition for writ of certiorari is pursuant to 28 U.S.C. § 1254(a) which provides that this Court may review cases in the federal courts of appeal by "writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree."

PERTINENT RULES AND STATUTES

Rule 3(c) of the Federal Rules of Appellate Procedure:

> The notice of appeal shall specify the party or parties taking the appeal; shall designate the judgment, order or part thereof appealed from; and shall name the court to which the appeal is taken. Form 1 in the Appendix of Forms is a suggested form of a notice of appeal. An appeal shall not be dismissed for informality of form or title of the notice of appeal.

Rule 26(b) of the Federal Rules of Appellate Procedure:

> The court for good cause shown may upon motion enlarge the time prescribed by these rules or by its order for doing any act, or may permit an act to be done after the expiration of such time; but the court may not enlarge the time for filing a notice of appeal, a petition for

allowance, or a petition for permission to appeal. . . .

28 U.S.C. § 1653:

Defective allegations of jurisdiction may be amended, upon terms, in the trial or appellate courts.

REASONS FOR DENYING THE WRIT

I.

THE DECISION OF THE SIXTH CIRCUIT, *EN BANC*, REGARDING THE DISMISSAL OF THE PETITIONERS FROM THIS APPEAL FOR FAILURE TO BE SPECIFIED IN THE NOTICE OF APPEAL IS IN ACCORD WITH THIS COURT'S DECISION IN THE *TORRES* CASE.

In *Torres v. Oakland Scavenger Co.*, 108 S.Ct. 2408 (1988), this Court was confronted with the question of "whether a federal appellate court has jurisdiction over a party who was not specified in the notice of appeal in accordance with Federal Rule of Appellate Procedure 3(c)." *Id.* at 2407. In that case, the petitioner, José Torres, was one of sixteen plaintiffs who had intervened in an employment discrimination suit in the United States District Court for the Northern District of California. Due to a "clerical error on the part of a secretary employed by the petitioner's attorney," Mr. Torres' name was inadvertently omitted from the body of the notice of appeal where the remaining fifteen intervening plaintiffs' names were included. *Id.*

In upholding the Ninth Circuit's dismissal of Mr. Torres' appeal for lack of jurisdiction under Rule 3(c),

Justice Marshall, writing for the majority, stated as follows:

> [W]e find that petitioner failed to comply with the specificity requirement of Rule 3(c), even liberally construed. Petition did not file the functional equivalent of a notice of appeal; he was never named or otherwise designated, however inartfully, in the notice of appeal filed by the 15 other intervenors. Nor did petitioner seek leave to amend the notice of appeal within the time limits set by Rule 4. Thus, the Court of Appeals was correct that it never had jurisdiction over petitioner's appeal.

Id. at 2409.

In response to the petitioner's argument that the use of the term "et al." was insufficient to indicate his intention to appeal, this Court stated that:

> The use of the phrase 'et al.' which literally means 'and others,' utterly fails to provide such notice to either intended recipient. Permitting such vague designation would leave the appellee and the court unable to determine with certitude whether a losing party not named in the notice of appeal should be bound by an adverse judgment or held liable for costs or sanctions. The specificity requirement of Rule 3(c) is met only by some designation that gives fair notice of the specific individual or entity seeking to appeal.

Id.

In applying the *Torres* analysis to the present case, the Sixth Circuit, *en banc*, concluded the following:

> The use of the phrase 'et al.' in the present notice of appeal, which was specifically rejected in *Torres*, is contrary to the language and spirit

> of *Torres* and precludes a conferment of jurisdiction over the appeal of the individual plaintiffs. Further, the use of the term 'plaintiffs' in the body of the notice failed to designate the individual plaintiffs in light of the failure specifically to name them.

Minority Employees of the Tennessee Department of Employment Security, Inc. v. State of Tennessee, 901 F.2d 1327, 1332 (6th Cir. 1990) (*Minority Employees*).

The petitioners argue that the use of the phrases "functional equivalent," "otherwise designated," and "some designation" by this Court in the *Torres* opinion should open the door for the Sixth Circuit to make an inquiry as to whether the petitioners, Rosetta N. Davis, Alma C. Oliver, and Hazel Perry were, in fact, intended to be named in the notice of appeal. Petition for Writ of Certiorari, pp. 19-20. The Sixth Circuit agrees that such language "appears to contemplate something less than naming"; however, the Sixth Circuit did not read *Torres* to permit courts to inquire into whether or not the respondents were misled or prejudiced by the notice of appeal. *Id.* In fact, the Sixth Circuit concluded the import of the phrases "some designation" or "otherwise designated" as "possibly referring to issues such as class representation." *Id.* at 1336.

The Sixth Circuit identified the conflict among the circuits resolved by the *Torres* decision as being "whether or not something less than *naming* would be acceptable." *Id.* at 1333 (emphasis in original). The Court said that "the explicit language of *Torres* supports a reading that naming is required: 'The failure to name a party in a notice of

appeal is more than excusable "informality"; it constitutes a failure of the party to appeal.' 109 S.Ct. at 2407" *Minority Employees*, 901 F.2d at 1336.

More significantly, this Court in the *Torres* decision expressly rejected this "harmless error" analysis, stating that a "litigant's failure to clear a jurisdictional hurdle can never be 'harmless' or waived by a court." *Torres*, 108 S.Ct. at 2409 n.3.[1] Thus, the Sixth Circuit's interpretation of Rule 3(c) of the Federal Rules of Appellate Procedure is consistent with this Court's interpretation of that Rule in the *Torres* decision.

Even if Rule 3(c) of the Federal Rules of Appellate Procedure permits something less than the naming of the individual appellants on the face of the document of the notice of appeal through some other means of designation, the petitioners in this case have failed to be "otherwise designated" in the notice of appeal. The pertinent language of the notice of appeal in this case is two-fold. First, the caption states "Minority Employees of the Tennessee Department of Employment Security, Inc., et al." Second, the body of the notice of appeal states "Now come plaintiffs in the above case and appeal. . . . " Whether taken separately or together, the language of these two pertinent portions of the notice of appeal in no

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[1] Likewise Justice Scalia in his concurring opinion in *Torres* stated that "[b]y definition all rules of procedure are technicalities; sanction for failure to comply with them always prevents the court from deciding where justice lies in the particular case on the theory that securing a fair and orderly process enables more justice to be done in the totality of cases." *Torres*, 108 S.Ct. at 2410 (Scalia, J., concurring).

way designates the petitioners, Rosetta N. Davis, Alma C. Oliver, and/or Hazel Perry as appealing the district court decision.

First, this Court in *Torres* rejected the argument that the term "et al." was sufficient to designate Mr. Torres as an appellant. *Torres*, 108 S.Ct. at 2409. Likewise, the term "et al." is insufficient to designate the petitioners, Rosetta N. Davis, Alma C. Oliver, and Hazel Perry as appellants from the district court to the court of appeals. As for the use of the term "plaintiffs" in the body of the notice of appeal, it is impossible to know which of the "plaintiffs" are being designated as appellants, especially in light of the fact that there are four plaintiffs in the case. There is no indication that some or all of the plaintiffs are appealing the decision of the district court.[2]

As for the petitioners' argument that the Sixth Circuit erred in not permitting them to amend their notice of appeal pursuant to 28 U.S.C. § 1653, such an argument fails due to the fact that the petitioners attempted to make such an amendment after the time for taking the appeal had expired. This Court in *Torres* noted that the petitioner did not "seek leave to amend the notice of

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[2] Likewise, in his concurring opinion, Judge Guy states that "[c]ompany or corporate names are treated grammatically the same as collective nouns." *Minority Employees*, 901 F.2d at 1340 (Guy, J., concurring). Thus, according to Judge Guy, one might appropriately say that the " 'Minority Employees of the Tennessee Department of Employment Security, Inc., *are* appealing the district court dismissal,' " or the " 'Minority Employees of the Tennessee Department of Employment Security, Inc., *is* the only appellant in this case.' " *Id.* at 1340-41 (emphasis in original).

appeal within the time limits set by Rule 4." *Torres*, 108 S.Ct. at 2409.

Likewise, the Sixth Circuit stated that under Rule 26(b) of the Federal Rules of Appellate Procedure, courts may not enlarge the time for filing of a notice of appeal. *Minority Employees*, 901 F.2d at 1337. The petitioners in this case failed to amend their notice of appeal within the time prescribed under Rule 4; therefore, such an attempt to amend the notice of appeal is of no effect.

The decision of the Sixth Circuit, *en banc*, is consistent with the analysis of this Court in the *Torres* case. The principles and guidelines in *Torres* regarding Rule 3(c) were properly applied by the Sixth Circuit. Accordingly, this Court should deny the writ in this case.

II.

WITH THE EXCEPTION OF THE NINTH CIRCUIT, THE DECISION OF THE SIXTH CIRCUIT, *EN BANC*, IS CONSISTENT WITH ALL OTHER CIRCUITS WHICH HAVE ADDRESSED THIS ISSUE SUBSEQUENT TO *TORRES*, INCLUDING THE FIRST, SECOND, SEVENTH, ELEVENTH AND DISTRICT OF COLUMBIA CIRCUITS.

Subsequent to this Court's decision in the *Torres* case, a number of other circuits have rendered decisions which are in agreement that the use of the term "et al." is insufficient to name or otherwise designate a party for purposes of notices of appeal under Rule 3(c). Those decisions are as follows:

First Circuit – Santos-Martinez v. Soto-Santiago, 863 F.2d 174 (1st Cir. 1988) (use of the phrase "et al." in the caption of the present appeal is inadequate to specify the plaintiffs who are actually appealing); *Rosario-Torres v. Hernandez-Colon,* 889 F.2d 314 (1st Cir. 1989) (*en banc*) (the use of the term "et al." is insufficient to designate; unnamed plaintiffs failed to appeal);

Second Circuit – Shatah v. Shearson/American Express Inc., 873 F.2d 550 (2nd Cir. 1989) ("et al." is insufficient to designate; notice of appeal sufficient only with respect to two parties specifically named);

Seventh Circuit – Akins v. Board of Governors of State Colleges and Universities, 867 F.2d 972 (7th Cir. 1988) (appeal dismissed with respect to all individuals except the plaintiff actually named in the notice);

Eleventh Circuit – Cotton v. U.S. Pipe and Foundry Co., 856 F.2d 158 (11th Cir. 1988) (appeal effective only as to named parties);

District of Columbia Circuit – Appeal of District of Columbia Nurses Association, 854 F.2d 1448 (D.C.Cir. 1988) ("et al." is insufficient to designate unnamed parties).

On the other hand, there is a decision of the Ninth Circuit which does conflict with the decision of the Sixth Circuit in this case along with the decisions of the First, Second, Seventh, Eleventh, and District of Columbia Circuits. *See Nat'l Center for Immigrants' Rights, Inc. v. Immigration and Naturalization Service,* 892 F.2d 814 (9th Cir. 1989).[3]

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[3] It is interesting to note that the Ninth Circuit expressly followed the reasoning of and quoted extensively from a panel

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The fact that there is a conflict among the circuits on a particular issue does not mean that this Court should automatically grant a petition for writ of certiorari. Rule 17.1 of the Supreme Court Rules provides that the factors listed in considering review on certiorari, including conflicts among the circuits, are "neither controlling nor fully measuring the court's discretion . . . " Moreover, during its last term, this Court denied certiorari in at least forty-eight instances where a conflict did exist among the circuits on an issue of federal law.[4] More importantly, the overwhelming number of circuit decisions are consistent with the Sixth Circuit's decision in this case. Only the Ninth Circuit disagrees with the decision of the Sixth Circuit.

Finally, although the results in this case may appear to be harsh, the Sixth Circuit, along with five other circuits, have attempted to faithfully follow and apply the principles established by this Court in the *Torres* case. As presently written, Rule 3(c) requires precision for the party wishing to appeal the decision of a district court.

(Continued from previous page)

decision of the Sixth Circuit in *Ford v. Nicks*, 866 F.2d 865 (6th Cir. 1989), which has now been explicitly rejected by the Sixth Circuit *en banc* in this case. *Minority Employees*, 901 F.2d at 1330.

[4] In the case of *Beaulieu v. United States*, 58 U.S.L.W. 3834 (1990), Justice White in dissenting from a denial of a petition for writ of certiorari noted that "on 48 occasions I dissented because in my view there were conflicts among courts of appeal sufficiently crystallized to warrant certiorari if the federal law is to be maintained in any satisfactory, uniform condition." *Id.*

The petitioners failed to meet that standard by a wide margin; accordingly, this Court should deny the writ.[5]

CONCLUSION

Based upon the foregoing authorities and analyses, the respondents respectfully urge this Court to deny the petition for writ of certiorari.

Respectfully submitted,

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[5] If, as all of the members of the Sixth Circuit suggest, "a revision in Rule [3(c)] might be beneficial. . . . ", *Minority Employees*, 901 F.2d at 1335 n. 4, the proper avenue for such refinements is through rule-making rather than case-by-case adjudication.